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No. 93-~~1934~~ 6497

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,
Petitioner,
v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice Institution Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

DOES A FEDERAL DISTRICT COURT POSSESS JURISDICTION TO GRANT A STAY OF EXECUTION UNDER EITHER 28 U.S.C. § 2251 OR 28 U.S.C. § 1651(A), IN ORDER TO APPOINT COUNSEL FOR AN INDIGENT *PRO SE* DEATH ROW INMATE WHO HAS NOT YET FILED A HABEAS CORPUS PETITION BUT WHO HAS EXPRESSED AN INTENTION TO FILE A PETITION ONCE COUNSEL IS OBTAINED?

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The American Bar Association ("ABA") submits this brief to provide the Court with comparative information about the capital counsel crisis in Texas and the quite different two-part national consensus that (1) counsel should be provided to condemned prisoners throughout first-time state and federal postconviction litigation, and (2) counsel should be given reasonable time to investigate, prepare and litigate first-time postconviction claims.[1] This information helps give meaning to the federal statutes that control this case. The ABA has obtained the consent of both parties to file this brief.

The ABA takes no position on the constitutionality of the death penalty. It has worked hard to try to ensure that the death penalty is administered fairly. In 1986, the ABA created a Death Penalty Postconviction Representation Project, which recruits volunteer lawyers to represent death row inmates and seeks to create programs that provide qualified, compensated counsel to capital postconviction petitioners.

The ABA also has commissioned several studies of the experiences of counsel in capital postconviction cases and judicial review of death cases. The ABA experience and studies establish that, after execution dates have been set, it is increasingly difficult nationally, and often impossible now in Texas, to recruit volunteer attorneys to represent indigent death-sentenced prisoners in first-time capital postconviction cases.[2] This is one of the multiple causes

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[1] In this brief, the ABA intends the term "postconviction" to include both state collateral challenges to capital convictions and sentences, called "habeas corpus" in Texas, and federal habeas corpus.

[2] Spangenberg Group, A Study of Representation of Capital Cases in Texas i, viii, 161-63 (Mar. 1993) (study provided to the Clerk, United States Supreme Court) [hereinafter 1993 Texas Capital

of the Texas crisis [3] that produced this case.[4]

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

SUMMARY OF ARGUMENT

Texas' death row population is the second largest in the United States. In October 1993 there were 365 Texas death-sentenced prisoners.[5] They had been convicted and

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Representation Study]. This study was requested by the State Bar of Texas and funded by the Texas Bar Foundation. *Id.* A summary of the study's findings is contained in Mark Ballard, *Study Rips Texas' Capital Representation*, Texas Lawyer, Apr. 26, 1993, at 3.

[3] 1993 Texas Capital Representation Study, *supra* note 2, at i.

[4] The ABA currently is attempting to help create a governmentally-funded capital postconviction program in each death penalty state. This is a logical outgrowth of prior ABA actions. In 1979, the ABA proposed "that the United States Supreme Court adopt a rule providing for appointment of counsel *to prepare* petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel . . . ." ABA Res. 102B (adopted by ABA House of Delegates at 1979 Midyear Meeting) (emphasis added). In 1982, the ABA resolved to "support the *prompt availability* of competent counsel for both state and federal [postconviction] court proceedings." ABA Res. 112D (approved by ABA House of Delegates at 1982 Annual Meeting) (emphasis added).

The ABA also has been a leading proponent of legislative reform designed to secure competent attorneys for capital defendants and petitioners. *See* ABA Crim. Just. Section, Report to the House of Delegates (1989), *reprinted in* 40 Am.U.L. Rev. 1, 9 (1990) [hereinafter ABA Habeas Report]. This major report is analyzed in this brief, as are other ABA reports and studies.

[5] California's is the largest; it had 375 death-sentenced prisoners in October 1993. NAACP Leg. Def. and Educ. Fund, Inc., Death Row, U.S.A., Fall 1993, at 13, 36.

sentenced in 73 of Texas' 254 counties.[6] Although the sheer numbers of death-sentenced prisoners, as well as the geographical dispersion of counties in which they were convicted, have contributed to the crisis that produced this case, there are several more important causes of that crisis. First, Texas fails to provide counsel to death-sentenced prisoners who wish to file state habeas corpus petitions.[7] Its "capital representation" problem "is substantially worse than that faced by any other state with the death penalty." [8] It is the only death penalty state in which death-sentenced prisoners are not routinely represented in state postconviction proceedings.[9]

Second, excluding California (for which data were not available), in 1993 Texas judges set approximately *three quarters of the nation's execution dates* for death-sentenced prisoners who had not completed first-time state and federal postconviction proceedings ("first-time postconviction review").[10] ABA Study: An Updated Analysis of the

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[6] 1993 Texas Capital Representation Study, *supra* note 2, at iii, 5.

[7] "Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level." *Id.* at ii. Although Texas law authorizes district court judges to appoint and compensate counsel in state habeas corpus proceedings, "this is almost never done." *Id.* at vii.

[8] *Id.* at i.

[9] ABA Study: An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases, at Executive Summary (study conducted by the Spangenberg Group, provided to the Clerk, United States Supreme Court) [hereinafter 1993 ABA Counsel Study]. Until relatively recently, even with the extraordinary problems associated with recruiting volunteer lawyers, 1993 Texas Capital Representation Study, *supra* note 2, lawyers generally were available to represent habeas petitioners in State court. *Id.* at 97. Now, a number of prisoners cannot obtain counsel, at least when they are scheduled for execution. *See infra* Argument I.A. and notes 12-13.

[10] There were 85 such execution dates, 63 of which were set by Texas district courts. 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. In California, during first-time postconviction review, execution dates are stayed when court-appointed counsel file pleadings within prescribed timelines. *Id.*; *see infra* note 28.

Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases, at Executive Summary (Dec. 1993) (study conducted by the Spangenberg Group, provided to the Clerk, United States Supreme Court) ("1993 ABA Counsel Study"). Judges often set these execution dates soon after the conclusion of direct appeal [11] and refuse to stay executions for a reasonable period to allow first-time postconviction petitioners to obtain volunteer counsel and pursue postconviction litigation. Fewer and fewer attorneys are volunteering under these circumstances.[12] Approximately 70 death-sentenced prisoners whose convictions and sentences have been affirmed on direct appeal do not now have lawyers.[13]

Third, shortly before the Fifth Circuit's decision in this case, it affirmed the District Court decision in *Gosch v. Collins,* SA-93-CA-731 (W.D.Tex. Sept. 15, 1993), *aff'd,* 1993 U.S. App. Lexis 29086 (5th Cir. Sept. 16, 1993). Before *Gosch,* federal district courts in Texas generally responded to the first-time habeas petitions of death-sentenced, *pro se* prisoners by staying their executions for a reasonable period of time so they could obtain counsel,

[11] "Once the [Texas] Court of Criminal Appeals affirms a sentence of death, the state district court often sets an early execution date." 1993 Texas Capital Representation Study, *supra* note 2, at 5. Indeed, Texas district courts sometimes set execution dates *before* the disposition of certiorari petitions by this Court until this Court indicated it would automatically stay them. *See Cole v. Texas,* 499 U.S. 1301 (1991) (Scalia, J., sitting as Circuit Justice) ("I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari.").

[12] "It is far more difficult to get a lawyer to step into a case under an active execution warrant than it is when there is substantial time to prepare for the case." 1993 Texas Capital Representation Study, *supra* note 2, at vii-viii. "Texas is runing out of volunteer lawyers and law firms willing to provide pro bono . . . representation in capital cases at State habeas." *Id.* at viii.

[13] Petitioner's Brief in Support of Application for Certificate of Probable Cause and Motion for Stay of Execution at 9, *McFarland v. Collins,* 7 F.3d 47 (5th Cir. 1993).

or by staying their executions and appointing them counsel. *See, e.g., Caldwell v. Collins,* No. 3:92CV1316-P, at 1 (N.D. Tex. June 30, 1992) (appointing counsel and staying execution because petitioner "has not had legal counsel to help him prepare and file an adequate initial Petition for Writ of Habeas Corpus . . . ."); *Hernandez v. Collins,* No. CA-L-92-111, at 1 (S.D. Tex. Aug. 20, 1992) (staying execution and noting "the ever-growing crisis concerning the obtaining of quality legal representation for indigent defendants sentenced to death"); *Long v. Collins,* No. 3-92CV1889-T (N.D. Tex. Sept. 15, 1992) (appointing counsel, staying execution and giving counsel 100 days to prepare and file an amended habeas petition); *Sterling v. Collins,* No. 3-93CV0147-G, at 1 (N.D. Tex. Jan. 22, 1993) (staying execution and giving petitioner, with the help of the Texas Resource Center, 120 days to recruit volunteer counsel to "prepare and file a proper amended habeas corpus petition").

In *Gosch,* the District Court consolidated the *pro se* habeas petitioner's stay request and appointment of counsel request with the single issue raised in this petition, and, with execution imminent, decided all three. The Court, apparently simultaneously, denied the stay request, denied relief on the merits and appointed a lawyer from the Texas Resource Center to represent Gosch. *Gosch v. Collins, supra.* The Fifth Circuit affirmed. *Id.*[14]

These State practices and federal decisions now predetermine for *pro se* petitioners the outcome of a Kafkaesque process that undermines—indeed threatens to gut—federal habeas corpus and the right to counsel provisions of the Anti-Drug Abuse Act. The process and outcome are these:

1. Based on the decision of the Fifth Circuit, federal courts in Texas will require that a death-sentenced prisoner file a first-time federal habeas corpus petition before it appoints counsel or considers staying the execution.

[14] For a more complete history of *Gosch, see infra* note 17.

2. The prisoner will not be capable, *pro se,* of filing even a minimally adequate federal habeas petition,[15] especially because no lawyer has investigated or litigated potential state habeas claims, and therefore some of the most important potential federal habeas claims, which often arise out of state habeas litigation,[16] have not been identified or exhausted.

3. If the prisoner, *pro se,* files a habeas petition, the district court may decide it on the merits as, or shortly after, it appoints counsel, and appointed counsel likely will be legally or practically foreclosed from asserting meritorious claims that counsel discovers after appointment.[17]

4. If the condemned prisoner, *pro se,* files a pleading like McFarland's,[18] but does not file a formal habeas petition, he will be put to death, even though he may have meritorious federal constitutional claims, (a) before he can

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[15] *See infra* Argument IV.

[16] *See infra* Argument IV.

[17] *See Gosch v. Collins,* SA-93-CA-731 (W.D. Tex. Sept. 15, 1993), *aff'd,* 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993). If, as in *Gosch,* counsel is appointed *as* the court denies a *pro se* petition on the merits, there is very little counsel can do. Indeed, in *Gosch,* after the district court denied relief, counsel filed a second habeas petition (the first one for which Gosch had counsel), in which Gosch asserted five new grounds for relief. The District Court initially stayed the execution, but then denied the petition and vacated the stay. The court held alternatively that it lacked jurisdiction and that the second petition abused the writ. *Gosch v. Collins,* SA-93-CA-736 (W.D. Tex. Oct. 12, 1993), *appeal pending,* No. 93-8780 (5th Cir.). The court said "[t]he same 'abuse of the writ' standard applies regardless of whether the petitioner is proceeding *pro se* or with the assistance of counsel." *Id.* at 12 (Memorandum Opinion and Order). Even if appointed counsel has a few days or weeks to investigate and prepare habeas corpus claims, that will not be enough time to represent a petitioner effectively. *See infra* Argument IV.

[18] He filed a *Pro Se* Motion For Stay of Execution and Request for Appointment of Counsel, in which he stated his intent to file a habeas corpus petition. *See* Petitioner's Brief.

obtain the lawyer intended by Congress to investigate and, where meritorious, assert those claims, and (b) before he can invoke federal habeas corpus, the historic collateral remedy Congress provided to vindicate those claims.

This "perverse" [19] process effectively nullifies the Great Writ and violates the central purpose of Congress in enacting the counsel provisions of the Anti-Drug Abuse Act, 21 U.S.C. § 848(q)(4)-(10) (1988), which was to make federal habeas corpus more available to condemned prisoners. To advance the purposes underlying these statutes, as well as 28 U.S.C. § 1651(a), and informed by the two-part national consensus, *see infra* Arguments II and III, this Court's habeas corpus jurisprudence, *see infra* Argument IV, and the chaotic and unfair consequences of affirmance, *see infra* Argument V, the Court should construe these federal statutes to require federal district courts to grant a stay of execution and to appoint counsel to an indigent *pro se,* death-sentenced prisoner who files a pleading like the one McFarland filed. (In this brief, we call such an appointment "early appointment of counsel").

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[19] *Brown v. Vasquez,* 952 F.2d 1164, 1169 (9th Cir. 1991) (identifying the "perverse absurdity" of executing habeas petitioners "before appointed counsel could be found or before that counsel could undertake the task for which he was appointed"), *cert. denied,* 112 S. Ct. 1778 (1992).

ARGUMENT

I. WITHOUT REASONABLE STAYS OF EXECUTION AND EARLY APPOINTMENTS OF FEDERAL HABEAS CORPUS COUNSEL, TEXAS DEATH-SENTENCED PRISONERS WHOSE CONVICTIONS AND SENTENCES HAVE BEEN UNCONSTITUTIONALLY IMPOSED WILL BE EXECUTED

A. The Texas Postconviction Process Does Not Reliably Identify Or Redress Constitutional Violations In The Cases Of Unrepresented Death-Sentenced Prisoners, Especially Because The State Seeks To Execute Them, Often Through Accelerated Procedures, Soon After The Conclusion Of Direct Review

In Texas, the extraordinary numbers of post-appeal execution orders, accelerated postconviction litigation schedules and decreasing numbers of volunteer attorneys effectively nullify the State postconviction process for many death-sentenced prisoners. The Texas capital representation crisis is the core problem.

Almost all the lawyers in Texas capital postconviction proceedings are volunteers.[20] This is a difficult undertaking. Substantive and procedural death penalty law is extraordinarily complex;[21] the practice is stressful;[22] and it is time-consuming and therefore expensive.[23]

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[20] 1993 Texas Capital Representation Study, *supra* note 2, at i-ii.

[21] *See infra* Argument IV.

[22] There is an extraordinary "emotional cost associated with the representation of a person whose sole lifeline may be the volunteer attorney." Richard J. Wilson & Robert L. Spangenberg, *State post-conviction representation of defendants sentenced to death*, 72 Judicature 331, 337 (Apr.-May 1989).

[23] In 1986, the American Bar Association conducted a national survey of the time spent and expenses incurred by attorneys in capital postconviction cases. The median hours of attorneys who represented capital petitioners in state and federal postconviction cases were: 400 at the state trial court level; 200 on state appeal; 65 on state certiorari to this Court; 305 at the federal district court level; 320 on federal appeal; and 180 on federal certiorari to this Court. *See* Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases 9 (1987) (Table 5) (study provided to the Clerk, United States Supreme Court). The 1993 Texas Capital Representation Study found that the median number of attorney hours spent on habeas capital cases in Texas courts was 350. The time was "understated" because some of the cases still were "active." 1993 Texas Capital Representation Study, *supra* note 2, at 90. Thus, a lawyer who volunteers to represent a Texas death-sentenced prisoner likely will commit at least several hundred uncompensated hours to state postconviction litigation.

These problems are magnified when execution dates have been set. To stay the execution, counsel must master a substantial record and a complex area of law while simultaneously litigating both the merits and the stay request in federal and state forums, often before more than one court in each. This sometimes involves a literal race from court to court to meet deadlines.

The Texas capital representation crisis has been building for several years. In 1987, a Texas committee chaired by the Honorable M.P. Duncan III of the Texas Court of Criminal Appeals concluded that "the absence of a system to insure that death-sentenced inmates have counsel throughout the appeals process has had a detrimental effect upon all the parties and upon the quality of justice in both our state and federal courts." Texas State Bar Ad Hoc Comm. Regarding Legal Representation of Those on Death Row, Texas Plan 1 (1987) (committee report, provided to the Clerk, United States Supreme Court). The absence of a counsel system affected the state ("cases have not progressed smoothly or at a reasonable pace through the court system"), the defendant ("he or she has not had the means to test the fairness of his or her conviction and sentence of death"), the courts ("it has meant high-pressure decision making because an execution is imminent and sometimes briefs and arguments have been inadequate"), and "society at large" ("the larger issues present in many of the death cases receive inferior adversarial testing"). *Id.* at 1-2.

The representation problem became significantly worse in 1991 when "the Court of Criminal Appeals suddenly stopped granting stays to allow additional time for the [Texas Resource] Center to recruit volunteer counsel"; and, at the same time, "state trial courts began setting execution dates in unprecedented numbers": 64 in 1991; 111 in 1992; and 89 in 1993 (as of October 26, 1993).[24] Now, "[m]ore than 75 death row prisoners do not have attorneys." As a result, "[n]o attorney has examined these individuals' cases for potential postconviction appeals." Texas Resource Ctr. Bd. of Dir., Crisis in Representation of Texas Death Row Inmates 6 (Oct. 26, 1993) (paper provided to the Clerk, United States Supreme Court).

A 1993 study confirmed these conclusions, stating, "in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty. Spangenberg Group, A Study of Representation of Capital Cases in Texas, at i (Mar. 1993) (study provided to the Clerk, United States Supreme Court) ("1993 Texas Capital Representation Study"). The Texas problem is "desperate" because the number of cases is "overwhelming," "no funds are allocated for payment of counsel or litigation expenses" and "the number of available attorneys and firms remains limited." *Id.* at ii. The study links Texas' execution scheduling policy to declining numbers of volunteer lawyers, noting that "the large number of cases with approaching dates of execution makes the problem most acute at this time." *Id.* The problem will get worse. "We estimate that the number of persons on death row will continue to grow at an even higher rate in the next few years." *Id.* at 4.

[24] Texas Resource Ctr. Bd. of Dir., Crisis in Representation of Texas Death Row Inmates 5 (Oct. 26, 1993) (paper provided to the Clerk, United States Supreme Court) (footnote omitted). In 1992, there also was a marked increase in the "rate of affirmances of death sentences by the Court of Criminal Appeals." *Id.*

Although there now is a resource center in Texas, for many reasons it is incapable of representing all, or even most, of Texas' death-sentenced prisoners. No state provides less financial support for state postconviction counsel in capital cases than does Texas.[25] No state, through its death warrant policy, provides more work for resource center attorneys. By generating approximately 75% of the nation's first-time postconviction death warrants (outside of California), 1993 ABA Counsel Study, *supra*, at Executive Summary, Texas both forces the Resource Center attorneys to dedicate enormous amounts of time to "satellite litigation" that "occurs at every court level," ABA Crim. Just. Section, Report to the House of Delegates (1989), *reprinted in* 40 Am. U.L. Rev. 1, 9, 138 (1990) ("ABA Habeas Report") (footnotes omitted), and makes it more difficult for the Center to recruit volunteer lawyers to help. "Few good attorneys are willing to litigate in such harried and compressed circumstances." *Id.* at 40 n.85; *see supra* note 12.

In sum, "despite enormous effort in a wide variety of areas, the Resource Center is simply not equipped to handle the kind of work required of it by current practices regarding the appointment of counsel in capital cases." 1993 Texas Capital Representation Study, *supra*, at 9.

B. Reasonable Stays Of Execution And Early Appointments Of Federal Habeas Corpus Counsel Are Essential To Allow Death-Sentenced Prisoners To Identify And To Seek Redress For Constitutional Violations

As this case demonstrates, the Texas capital representation problem is not just a state problem; it is a serious federal problem as well. In all other death penalty states, lawyers are representing first-time state postconviction pe-

[25] *See* 1993 Texas Capital Representation Study, *supra* note 2, at 127 (Table 9-4). Even in those states in which there is no "clear responsibility to provide counsel and compensation," funds still are provided "in the vast majority of cases." *Id.* The State of Texas provides no financial support to the Resource Center. *Id.* at 6-9.

titioners, *see* 1993 ABA Counsel Study, *supra,* at Executive Summary, and, therefore, can identify the direct appeal and postconviction issues that should be included in a federal habeas corpus petition. Often, that lawyer investigates and drafts a first-time federal habeas petition, which results in the federal appointment of counsel. In these other states, the postconviction lawyers, as well as other lawyers, have reasonable time to investigate, prepare and assert habeas claims. *Id.*

Increasingly in Texas, death-sentenced prisoners can not obtain a state habeas lawyer who, upon completion of the state proceeding, could draft the first-time federal habeas petition. The Fifth Circuit's decision in *Gosch v. Collins, supra,* likely will make it harder to recruit volunteer federal habeas lawyers. Potential volunteer attorneys now know they may have little time to investigate, prepare and litigate first-time federal habeas claims.[26]

The only way to effectively enforce the federal habeas corpus and federal right to counsel provisions for death-sentenced prisoners like McFarland is to stay executions. Such stays should not cause unwarranted delay. After staying an execution the district court could either require petitioner to obtain volunteer counsel promptly or *immediately* appoint counsel and issue a reasonable sched-

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[26] The absence of counsel in the state habeas corpus proceeding, or the absence of the state proceeding itself, will have extraordinary impact on federal habeas jurisprudence and the habeas role of the federal courts. In its Habeas Report, *supra* note 4, at 72 (citations omitted), the ABA said:

> The more fully and effectively litigated the prior stages in the process have been, the more efficient postconviction review (including federal habeas corpus review) will be. By helping to build a clear and complete state court record, for example, competent counsel in the state courts can go a long way toward assuring that the federal courts can move quickly and directly to the substantive merits of the claims raised in the habeas corpus petition.

Construing the federal statutes as Petitioner proposes would avoid troubling Federalism-based problems.

uling order. After reviewing the record and conducting an expeditious investigation, as warranted, counsel could assert colorable and exhausted constitutional claims in a federal habeas petition. Or counsel might identify colorable claims that have not been exhausted, seek to dismiss without prejudice the federal proceeding, *see Clark v. Tansy,* 1993 U.S. App. LEXIS 33987 (10th Cir. Dec. 30, 1993) (district court decision to deny habeas petitioner's motion to dismiss without prejudice subject to "abuse of discretion" standard of review), and assert those claims in a state habeas petition, in which case counsel thereafter would be acting as a volunteer. *See In re Lindsey,* 875 F.2d 1502 (11th Cir. 1989).[27] The district court, which has ample powers to manage and schedule litigation, would have broad discretion to prevent abuse of such a process. *See, e.g., Duff-Smith v. Collins,* 973 F.2d 1175, 1179 (5th Cir. 1992) (district court did not abuse its discretion by denying replacement habeas counsel's request to amend petition and conduct a "*McCleskey* investigation"), *cert. denied,* 113 S. Ct. 1958 (1993).

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[27] Although it might appear that exhausting state remedies would delay an execution, "[w]ith a complete record," which can be developed in State court, "most or all of the time-consuming factual, preliminary and procedural questions that now take up so much of the federal court's time in habeas cases will be eliminated." ABA Habeas Report, *supra* note 4, at 72 (citations omitted). If, *arguendo,* exhausting remedies in state court does take additional time, that delay could be obviated if Texas provided State postconviction petitioners with postconviction counsel and a more orderly postconviction process. It is clear that if the federal habeas petitioner does not exhaust state remedies, but chooses instead to assert only exhausted issues in federal court, he will not be able to return to state court, exhaust the unexhausted issues and assert them in a second federal habeas petition. *McCleskey v. Zant,* 499 U.S. 467 (1991). "After *McCleskey,* it is essential that a habeas petitioner exhaust every possible claim in state court prior to proceeding for the first time on habeas." *Clark v. Tansy,* 1993 U.S. App. LEXIS 33987, at *5 (10th Cir. Dec. 30, 1993).

II. THERE NOW IS A NATIONAL CONSENSUS THAT COUNSEL SHOULD BE PROVIDED TO FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS THROUGHOUT THE STATE AND FEDERAL POST-CONVICTION PROCESS

A. The Report of the Powell Committee

In 1989, a distinguished committee chaired by former Justice Lewis F. Powell, Jr. criticized unnecessary delay in the review of capital cases, distinguishing "delay needed for review of constitutional claims." Judicial Conf. of the U.S. Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (Aug. 23, 1989) ("Powell Committee Report"). The Committee identified a "second serious problem": a "pressing need for qualified counsel to represent inmates in collateral review." *Id.* at 4. The Committee stressed that "provision of competent counsel for prisoners under capital sentence *throughout* both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants," and warned that "[t]he belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness." *Id.* (emphasis added).

B. Actions Taken by the United States Judicial Conference and State Conference of Chief Justices

Federal and state judges have worked to ensure that capital postconviction petitioners are adequately and continuously represented. In March 1987 the United States Judicial Conference amended Paragraph 2.14B (now Paragraph 6.01D(1)) of the Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A, to authorize federal judges to appoint qualified "state postconviction counsel" to represent capital habeas petitioners in federal court to assure "continuity of representation". The Judicial Conference also amended the Guidelines to authorize the reasonable employment and "compensation of public and private organizations," like resource centers, that "provide consulting services to appointed and *pro*

bono lawyers in capital federal habeas corpus cases." *See* Paragraph 6.03C.

In addition, resource centers now have been established in nineteen death penalty states. The Judicial Conference helped create these centers, several of which rely heavily on volunteer attorneys, to facilitate the early assignment of counsel in death penalty habeas corpus cases.

The Conference of Chief Justices, which includes the chief judicial officers of every state, has urged judicial leaders in each death penalty state to take action to assure that death row inmates receive competent legal representation in postconviction proceedings. In 1987, the Conference resolved that each state's judicial leadership should quickly begin a planning process "to establish a regular process of appointing, providing expert guidance for, and fairly compensating competent counsel to *prepare* and pursue state postconviction petitions for all state death row inmates wishing to pursue such remedies . . . ." Conference of Chief Judges, Res. IX, Representation of Death Row Inmates In Postconviction Proceedings (adopted at the 10th Midyear Meeting on Feb. 5, 1987) (emphasis added). The Chief Justices also proposed that the state and federal judiciaries seek "to assure continuity of representation of death row inmates in state and federal post conviction proceedings . . . ." *Id.*

C. ABA Habeas Report

In its Habeas Report, the ABA recommended that the state and federal governments should "provide competent and adequately compensated counsel" to "petitioners" throughout "all stages of capital punishment litigation." ABA Habeas Report, *supra,* at 9 (Recommendation No. 1). "Providing qualified counsel serves two major goals: it not only assures fairness, but also avoids unnecessary delay in the process." *Id.* at 15. The provision of "new counsel" to death-sentenced inmates "*before the Commencement of state post-conviction proceedings*" will, in the view of the ABA, "reduce protracted litigation and

later costly remands" by presenting "claims of ineffectiveness" in "the first petition." *Id.* at 24 (emphasis added). The ABA recommended that this new lawyer represent the death-sentenced prisoner throughout the remainder of state, federal and Supreme Court proceedings because "[c]ontinuity of counsel generally will minimize delay, and assure that counsel is familiar with and/or responsible for the record in the case." *Id.* at 24-25.

D. State Laws and Practices

In 1988, the results of a 1987 capital postconviction representation study were published. The study established that there were 30 states in which there had been capital postconviction litigation. In 14 states, "primary representation" was "provided either by a statewide public defender appellate unit or an independent state appellate program." In eight states, "primary representation" was "provided by local trial public defenders or contract programs." In seven states, including Texas, "volunteer counsel" were identified as one of the primary providers of representation." Richard J. Wilson & Robert L. Spangenberg, *State post-conviction representation of defendants sentenced to death,* 72 Judicature 331, 335 (Apr.-May 1989). Of the 30 states, 23 provided "pre-petition" postconviction counsel either "in all cases" (17), or in "most cases" or "frequently" (6). *Id.* In 1987, there was "a notable trend among the states to provide counsel prepetition, due in large measure to the . . . intricacies of state capital post-conviction law." *Id.* The authors predicted that "the pool of volunteer lawyers cannot expand rapidly enough to meet the growing need." *Id.* at 337.

In 1993, at the request of the ABA, The Spangenberg Group updated the 1987 study. Much had changed. *"[I]n all states but Texas,* counsel are appointed or otherwise available to represent petitioners in all first-round capital postconviction cases." 1993 ABA Counsel Study, *supra,* at Executive Summary (emphasis added). The other death penalty states rely on trial and appellate public defenders, court-appointed attorneys, contract attorneys, re-

source centers and volunteers, usually in some combination, to represent capital postconviction petitioners. *Id.*

We do not mean to overstate the point. In death penalty states other than Texas, volunteer attorneys represent death-sentenced prisoners, and the number of available volunteers in these states may be dwindling too. In other states, particularly those with large death row populations, lawyers who represent capital postconviction petitioners are struggling to keep up with increasing numbers of death-sentenced clients. Some of the state counsel coverage plans have patchwork and temporary qualities. The basic point, however, remains: Texas is the only death penalty state that fails to provide state postconviction counsel to first-time petitioners, issues execution orders soon after the conclusion of direct appeal, fails to automatically or routinely stay those orders while the prisoners obtain counsel, and seeks to execute unrepresented condemned prisoners, often under accelerated procedures, before they have had any real opportunity to pursue first-time state and federal postconviction relief.

III. THERE IS A NATIONAL CONSENSUS THAT FIRST-TIME CAPITAL POSTCONVICTION PETITIONERS SHOULD BE GIVEN A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS AND, CONVERSELY, SHOULD NOT BE REQUIRED TO INVESTIGATE, PREPARE AND LITIGATE THEIR CASES IN A FEW DAYS OR WEEKS UNDER IMPENDING EXECUTION DATES

A. The Report of the Powell Committee

The Powell Committee concluded that "last-minute litigation" to stay executions "disserves inmates, and saps the resources of our judiciary." Powell Committee Report, *supra,* at 1. The Committee characterized the "[f]requent litigation over motions for stays of execution" as "another example of an unnecessary step in the process," *id.* at 2, and it criticized "appointment of qualified counsel only when an execution is imminent." By this time,

"serious constitutional claims may have been waived." *Id.* at 4. The Committee proposed "one complete and fair course of collateral review in the state and federal system," under set time frames and "free from the time pressure of impending execution." *Id.* at 6.

B. ABA Habeas Report

After an extensive study by a task force of state and federal judges, prosecutors and defense attorneys, the ABA concluded that "[t]here is general agreement that the current situation," in which execution dates are set shortly after the end of the direct appellate process, "is neither desirable nor effective." ABA Habeas Report, *supra,* at 138. The ABA pointed out that support for its "one full and fair time through" approach, which includes the mandatory stay rule, "came from all sectors of the criminal justice system." "Even vigorous opponents of death penalty habeas corpus in its present form conceded that a proposal of one fair and complete course of post-conviction review free from the time pressures of an impending execution would be agreeable if it would then lead to finality." *Id.* at 38-39 (footnotes omitted). The ABA summarized some of the testimony on this point:

> Caprice Cosper, for example, an Assistant District Attorney in Houston, remarked that the setting of execution dates "is perhaps the single most substantial impediment to the orderly administration of capital habeas cases in Texas. . . . It makes a chaotic mess out of the system of administering these cases." Termed "cumbersome," "ludicrous," and "mind boggling," the setting of artificial execution dates and the "scorpions in a bottle mentality" that it engenders "undermines the system by undermining the quality of justice during eleventh-hour litigation."

Id. at 138 (footnotes omitted).

Stressing that "it is extremely difficult to recruit lawyers when an execution date has been set," *id.*, the ABA recommended that federal courts stay scheduled state executions "until the completion of the initial round of state and federal post-conviction review," because, *inter alia,* the mandatory stay rule would "help attract competent counsel to join (and not dissuade counsel from joining) the pool of available capital appellate and post-conviction attorneys." *Id.* at 10-11, 38.

C. State Laws and Practices

Texas is the only death penalty state in the nation that "routinely" sets, and does not subsequently "routinely" or "automatically" stay, execution dates before or during first-time post-conviction litigation. 1993 ABA Counsel Study, *supra,* at Executive Summary. Although 12 of 36 death penalty states issued execution warrants in 1993 during the first round of state and federal postconviction, in six of these states "stays of execution are automatically granted by law during the first round if petitions are filed by counsel within a reasonable period of time," and in five states "stays are routinely granted during the first round of post-conviction." "It is only in Texas that execution warrants are routinely filed first round and neither automatically stayed by state law or routinely stayed by state court judges." *Id.*[28]

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[28] In California, capital postconviction petitioners are entitled to court-appointed counsel. Wilson and Spangenberg, *supra* note 22, at 334; 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. State habeas corpus is consolidated with direct appeal, and both are filed in the State Supreme Court. *In re Clark,* 855 P.2d 729, 750-54 (Cal. 1993) (citing Policies, standards 1-1.1, 1-1.2, and 1-1.3 of the State Supreme Court). Trial judges, by law, cannot set executions until the conclusion of State direct appeal. *See* Cal. Penal Code § 1243 (West 1982). In practice, even if the State Supreme Court decides the direct appeal first, no execution dates are set; or if set, they are stayed. *See* 1993 ABA Counsel Study, *supra* note 9, at Executive Summary. California now is having problems obtaining counsel for the consolidated direct appeal and postconviction proceedings, but, unlike Texas, it stays executions until counsel can be obtained. *Id.*

The four federal district courts in California have established similar local rules governing capital habeas cases. *See* C.D. Cal. R. 26; E.D. Cal. R. 191; N.D. Cal. R. 296; S.D. Cal. R. 9.3. When state appellate counsel is not available to represent a petitioner, the California Appellate Project ("CAP") prepares and files on

These sources of a national consensus establish that Texas' execution scheduling practices are neither fair nor necessary to move capital postconviction cases at a reasonable pace.[29] The practices of California, *see supra* note

behalf of petitioner a *pro se* request for appointment of counsel and for a temporary stay of execution to permit a "Selection Board" to recommend a qualified attorney. *See Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992). The "appointment of counsel" stay lasts for 45 days, unless extended by the Court. *See* C.D. Cal. R. 26.8.7(b); E.D. Cal. R. 191 (b)(2); N.D. Cal. R. 296-8(b); S.D. Cal. R. 9.3(b)(8)(b). When state counsel continues into federal court, s/he must normally prepare and file a petition in order to obtain a stay, which will last until final disposition of the matter in the district court. *See* C.D. Cal. R. 26.8.7(a); E.D. Cal. R. 191(h)(1); N.D. Cal. R. 296-8(a); S.D. Cal. R. 9.3(b)(8)(a).

Newly-appointed counsel can obtain a "preparation of the petition" stay by filing a document called a specification of nonfrivolous issues. This stay is for 120 days, but may be extended upon a showing of good cause. *See* C.D. Cal. R. 26.8.6(c); E.D. Cal. R. 191(h)(3); N.D. Cal. R. 296-8(c); S.D. Cal. R. 9.3(b)(8)(c). Upon the filing of the petition, a stay pending final disposition in the district court issues. *See* C.D. Cal. R. 26.87(a); E.D. Cal. R. 191 (h)(1); N.D. Cal. R. 296-8(a); S.D. Cal. R. 9.3(b)(8)(a).

[29] Other states have addressed the delay problem by adopting compromise plans, like California's, designed to ensure that defendants receive postconviction counsel while also restricting the time period in which postconviction claims may be brought. In Florida, for example, the State Supreme Court promulgated a new Rule of Criminal Procedure, Rule 3.851, modifying its Rule of Criminal Procedure 3.850, effective January 1, 1994. The two rules require that petitions for state postconviction relief be filed within one year from the time the judgment and sentence become final on direct appeal in the Florida Supreme Court or by denial of certiorari by this Court. The rules also require appointment of counsel within thirty days after judgment and sentence become final, to begin addressing the prisoner's postconviction issues. If a death warrant is signed before expiration of the statute of limitations, the Florida Supreme Court will, upon a defendant's request, grant a stay of execution to allow any post-conviction relief motions to proceed in a timely and orderly manner. *Id.* By providing counsel to capital postconviction petitioners and imposing these time limits, Florida has taken important steps to resolve *its* capital representation problem, which, in the 1980s, was very similar to the current

28, and Florida, *see supra* note 29, are particularly instructive because these two states have death row populations that are comparable to that of Texas. *See* NAACP Leg. Def. and Educ. Fund, Inc., Death Row, U.S.A., Fall 1993, at 13 (California: 375), 17 (Florida: 331).

IV. THIS COURT'S HABEAS CORPUS JURISPRUDENCE DEMONSTRATES THE CRITICAL IMPORTANCE IN VINDICATING CONSTITUTIONAL RIGHTS OF HAVING BOTH COUNSEL THROUGHOUT THE STATE AND FEDERAL POSTCONVICTION PROCESS AND A REASONABLE TIME TO INVESTIGATE, PREPARE AND PRESENT CLAIMS

The capital postconviction decisions of this Court demonstrate (1) that capital postconviction law is extraordinarily complex, substantively and procedurally;[30] (2) that postconviction vindication of basic constitutional rights often depends upon extra-record evidence;[31] (3) that, for these (and other) reasons, *pro se* petitioners are not capable postconviction litigators,[32] especially when

Texas crisis. *See, e.g.*, Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U.L. Rev. 518, 567-85 (1988).

Florida's solution is not unique. At least eight other states have set specific periods of limitation, either by statute or court rule, in order to avoid delays. 1993 ABA Counsel Study, *supra* note 9, at Executive Summary.

[30] See discussion *infra* at 22-26. *See also Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (noting "complexity of our jurisprudence" in capital habeas corpus proceedings).

[31] *See, e.g., Amadeo v. Zant*, 486 U.S. 214 (1988); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986).

[32] *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (citation omitted) ("As Justice Stevens observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."). Furthermore, death row inmates often suffer from

execution is imminent and they must simultaneously litigate the merits of claims and seek stays of execution; and (4) therefore, having postconviction counsel in state and federal court, and a reasonable time to investigate, prepare and present capital claims, is essential to enforce constitutional rights. Some of the habeas corpus decisions of the Court that support these four contentions are discussed immediately below.

In *Amadeo v. Zant*, 486 U.S. 214 (1988), a unanimous Court reversed an Eleventh Circuit decision that had denied Amadeo habeas corpus relief. A local prosecutor had instructed the jury commissioner "to underrepresent black people and women on the master jury lists" from which Amadeo's grand jury and petit jury had been drawn. *Id.* at 217. At a federal habeas evidentiary hearing, Amadeo's postconviction lawyers, one of whom had represented him continuously in the postconviction process,[33] established the fact-based "cause" and "prejudice" that excused Amadeo's failure to raise the jury issues before indictment and voir dire,[34] and introduced extra-record evidence of the underlying underrepresentation scheme. *Id.* at 219. This Court reversed the Circuit Court for failing to give appropriate weight to the District Court's evidentiary findings.

In 1982-83, Alvin Ford "was reporting that 135 of his friends and family were being held hostage in the prison" and that prison guards, acting in conspiracy with the Ku Klux Klan, "had been killing people and putting the bodies in the concrete enclosures used for beds."

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mental or emotional disabilities. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 404 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 307-308 (1989).

[33] *Amadeo v. State*, 384 S.E.2d 181, 181 (Ga. 1989). In this 1989 decision, rendered after this Court's *Amadeo* decision, the Georgia Supreme Court noted that one of Amadeo's lawyers had represented him for ten years. *Id.*

[34] State law imposed these time limits. *Amadeo v. Zant*, 486 U.S. at 218 n.2.

Ford v. Wainwright, 477 U.S. 399, 402 (1986). Without representation of counsel prior to filing his federal habeas corpus petition and time to investigate and present his constitutional claims, Ford could not have developed the extra-record evidence of his insanity,[35] challenged the testimony of three State psychiatrists who summarily and collectively "examined" him,[36] or researched and marshaled the centuries-old common law tradition that persuaded this Court to hold that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10.[37] In addition, without counsel, Ford surely would have been executed before this Court could have considered and resolved the important issues that he presented.[38]

With legal representation provided well prior to filing his federal habeas corpus petition,[39] Samuel Johnson suc-

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[35] His insanity developed after conviction and imposition of sentence. *Ford v. Wainwright*, 477 U.S. at 401-02.

[36] *Id.* at 403-04.

[37] The Court also found unconstitutional Florida's procedures for determining whether death-sentenced prisoners are competent to be executed. *Id.* at 410-418. *See also id.* at 424 (Powell, J., concurring); *id.* at 427 (O'Connor, J., concurring).

[38] Prior to this Court's *Ford* decision, Ford's postconviction attorneys obtained orders staying two scheduled executions. *See Ford v. Strickland*, 676 F.2d 434, 437 (11th Cir. 1982); *Ford v. Wainwright*, 477 U.S. at 404; Response to Petition for Writ of Habeas Corpus, *Ford v. Wainwright*, No. 84-6493-Civ-NCR (S.D. Fla. May 29, 1984), *cited in* Joint Appendix, at 26-27, *Ford v. Wainwright*, 477 U.S. 309 (1986) (No. 85-5542). When this Court granted Ford relief, one of his attorneys had been representing him for over five years. *See Ford v. State*, 407 So. 2d 907, 907 (Fla. 1981); *Ford v. Wainwright*, 451 So. 2d 471, 473 (Fla. 1984); *Ford v. Wainwright*, 752 F.2d 526, 526 (11th Cir. 1985); *Ford v. Wainwright*, 477 U.S. at 401.

[39] The lawyer who represented Johnson on the direct appeal of his conviction, *see Johnson v. State*, 511 So. 2d 1333, 1335-36 n.1 (Miss. 1987), continued to represent Johnson throughout the next two years, including during the state habeas proceedings, *id.*, and

cessfully challenged his death penalty because it was based in part on an unrelated, illegally imposed New York felony conviction. *Johnson v. Mississippi,* 486 U.S. 578 (1988). Postconviction lawyers conducted the extra-record investigation that revealed that Johnson's New York sentence was illegal, and then initiated the New York proceeding that invalidated it. *See People v. Johnson,* 506 N.E.2d 1177, 1178 (N.Y. 1987); *Johnson v. State,* 511 So. 2d 1333, 1337 (Miss. 1987).[40]

Without legal representation and adequate time, Johnny Penry could not have vindicated, through federal habeas corpus, his constitutional right to have his capital sentencer consider important nonstatutory mitigating evidence: that Penry's IQ was "between 50 and 63"; that he had "the mental age of a 6½-year-old"; that his "ability to function in the world was that of a 9-or 10-year-old"; and that he had been physically abused as a child. *Penry v. Lynaugh,* 492 U.S. 302, 307-309, 312 (1989).

In three cases, counsel for Dale Yates analyzed and applied a variety of complex constitutional and criminal law principles first to identify an erroneous burden-shifting jury charge; then to establish that the decision invalidating such instructions applied retroactively; and finally to persuade this Court that the error was not harmless. *See Yates v. Aiken,* 474 U.S. 896 (1985); *Yates v. Aiken,* 484 U.S. 211, 216-18 (1988); *Yates v. Evatt,* 111 S. Ct. 1884, 1891-97 (1991).

With prefiling representation, and through federal habeas corpus, William Cartwright successfully challenged

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the final successful appeal to this Court, although he did not argue the case in this Court. *Johnson v. Mississippi,* 486 U.S. 578, 580 (1988).

[40] Postconviction counsel also obtained orders staying two scheduled executions so that they could investigate and present Johnson's ultimately successful federal habeas corpus claims. *See* Joint Appendix, Chronological List of Relevant Docket Entries at 1-2, *Johnson v. Mississippi,* 486 U.S. 578 (1988) (No. 87-5468).

the finding that his homicide was "especially heinous, atrocious, or cruel." *Maynard v. Cartwright,* 486 U.S. 356, 359-60 (1988). Counsel argued that the Oklahoma Court of Criminal Appeals had not construed this enhanced aggravating circumstance in a way that sufficiently channeled the discretion of the capital sentencer.

Similarly, it was only with prefiling representation, and through federal habeas corpus, that Robert Parker enforced the constitutionally based obligation supreme courts have in "balancing" states to reweigh aggravating circumstances against nonstatutory mitigating evidence after they strike an aggravating circumstance. *Parker v. Dugger,* 498 U.S. 308 (1991).[41]

The Court granted James Hitchcock's habeas corpus petition because Hitchcock's lawyer, who had represented him for over five years, established that the sentencing judge had erroneously believed that he could not consider evidence that might establish nonstatutory mitigating circumstances and because he so instructed the sentencing jury. *Hitchcock v. Dugger,* 481 U.S. 393 (1987).[42]

Habeas cases in which petitioners failed to prevail are as instructive as cases in which they prevailed. For example, in *McCleskey v. Zant,* 499 U.S. 467 (1991), the

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[41] Robert Link was Parker's counsel on direct appeal of his conviction in 1984, and he represented Parker for seven years, throughout the state and federal postconviction process. *See Parker v. State,* 458 So. 2d 750, 751 (Fla. 1984); *Parker v. State,* 491 So. 2d 532, 532 (Fla. 1986); *Parker v. Dugger,* 876 F.2d 1470, 1471 (11th Cir. 1989); *Parker v. Dugger,* 498 U.S. 308, 309 (1991). Parker's postconviction attorney also obtained orders staying two executions prior to this Court's 1991 decision.

[42] Hitchcock's postconviction lawyers obtained an affidavit from his trial attorney that supported their contention that the trial attorney believed he was legally precluded from producing nonstatutory mitigating evidence at Hitchcock's sentencing hearing. Hitchcock's postconviction attorneys also proffered to the District Court "significant evidence of nonstatutory mitigating factors [that] could have been presented at his sentencing hearing . . . ." *Hitchcock v. Wainwright,* 745 F.2d 1332, 1344 (11th Cir. 1984) (Johnson, J., dissenting), *aff'd en banc,* 770 F.2d 1514 (1985).

Court held that McCleskey had abused the writ by failing to allege a claim in his first habeas petition that he asserted in his second, based on newly discovered evidence. The district court had granted the writ, holding that McCleskey had not abused the writ because, when he filed his first petition, he had not known about a series of facts that helped establish the claim and, therefore, he had not deliberately withheld the claim. *Id.* at 475. The Eleventh Circuit reversed, and this Court affirmed the Eleventh Circuit decision. This Court's analysis of its abuse-of-the-writ doctrine provides compelling support for providing first-time habeas petitioners with counsel to draft that petition and for giving counsel reasonable time to investigate and present habeas corpus claims. To establish "cause" for a first petition omission, "petitioner must [have] conduct[ed] a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." If what petitioner later learns "supports a claim for relief in a federal habeas petition," but "*could [have been] discover[ed] upon reasonable investigation,*" petitioner may not assert the claim in a second habeas petition. *Id.* at 497-98 (emphasis added).

If habeas corpus petitioners are to be bound by what they "could discover upon reasonable investigation," they should be given the assistance of counsel guaranteed by federal statutes and reasonable time to conduct that "reasonable investigation." When they are, they often prevail in this Court. When, as in Texas, they are not, some will be executed even though their convictions or sentences were imposed unconstitutionally.

V. AFFIRMANCE OF THE FIFTH CIRCUIT'S DECISION IN THIS CASE WILL UNDERMINE THE ADMINISTRATION OF JUSTICE WITHOUT ADVANCING ANY LEGITIMATE COUNTERVAILING STATE INTEREST

Affirming the Fifth Circuit's decision will, we believe, sanction unfairness and chaos. Many *initial* habeas corpus appeals in the Fifth Circuit hereafter would be reviewed

under emergency timetables imposed by imminent state execution dates. Breathtaking expedition in such important matters with so little information cannot adequately assure both the substance and the appearance of justice in capital cases. With growing death row populations, disruption of the state and federal judicial systems occasioned by such expedited review would become more frequent in years to come. Moreover, if the Court affirms in this case, it may encourage other death penalty states to replicate the process that produced this case.

Plainly, expedition rules like the Fifth Circuit's *increase* the need for counsel. This Court's language in *Barefoot v. Estelle*, 463 U.S. 880 (1983), recognized this enhanced need by making counsel a predicate to upholding a *Barefoot*-style procedure. Unlike McFarland, Barefoot had counsel, and at the district court hearing his attorney "was allowed unlimited time to discuss any matter germane to the case." *Id.* at 886. Moreover, after the district court denied relief, Barefoot's *attorney* had "71 days to prepare the briefs and arguments" for presentation to the Fifth Circuit. *Id.* at 890. In denying relief, the Fifth Circuit specifically noted that Barefoot "is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law." Id. at 891 (quoting *Barefoot v. Estelle*, 697 F.2d 593, 599-600 (5th Cir. 1983)).

To require, as the lower court did in this case, that a *pro se habeas* corpus petitioner who has not voluntarily waived counsel litigate the merits of his capital claims in accelerated fashion ignores this Court's explicit warning in *Barefoot* that it would uphold accelerated procedures "provided that *counsel* has *adequate opportunity* to address the merits and knows that he is expected to do so." *Id.* at 894 (emphasis added).

The Court has long and properly insisted that capital cases be surrounded by the strictest standards to ensure procedural fairness. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977); *Lockett v. Ohio*, 438 U.S.

586, 603-604 (1978); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). The Fifth Circuit's decision in this case validates a process that is completely inconsistent with this fundamental principle.

We can identify no legitimate countervailing interest. Texas surely can have no legitimate interest in procedures so expedited that identification and redress of constitutional violations are virtually impossible.[43] Although Texas plainly has an interest in assuring that constitutionally imposed executions are carried out without unnecessary delay, that does not include "delay" that is "needed for review of constitutional claims." Powell Committee Report, *supra*, at 1. Many states, by court rule or statute, have enacted statutes of limitations that require capital postconviction petitioners to promptly file claims.[44]

VI. THE TWO-PART NATIONAL CONSENSUS, THIS COURT'S HABEAS CORPUS JURISPRUDENCE, AND THE UNFAIR AND CHAOTIC CONSEQUENCES OF AFFIRMANCE, ALL SUPPORT PETITIONER'S CONSTRUCTION OF THE FEDERAL STATUTES AT ISSUE IN THIS CASE

The ABA believes that the statutory construction arguments in Petitioner's Brief regarding 28 U.S.C. § 2251, 21 U.S.C. § 848(q)(4)-(10) and 28 U.S.C. § 1651 are sound as a matter of legislative language and history. The ABA adds only that the statutory interpretation proposed by Petitioner gains compelling force from consideration of the congressional purpose in enacting habeas corpus: to protect federal constitutional rights. *Cf., e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 (1985) (emphasis added) ("This Court has recog-

[43] Nothing in our submission to this Court is meant to suggest that the federal courts should be denied the procedural means to dispose summarily of frivolous or repetitive petitions submitted by condemned prisoners merely to delay their executions.

[44] *See supra* notes 28, 29. Counsel is provided to all capital postconviction petitioners in these states, however.

nized that there is 'a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the [IRS] if [this] authority is necessary for the *effective enforcement* of the revenue laws and is not undercut by contrary legislative purposes.' "); *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (emphasis added) ("These principles unquestionably support a construction of the statute that will enable a chancellor to impose the *most effective*, usual and straightforward remedy to rescind an unlawful purchase of stock or assets").

In construing these statutes, this Court must assume Congress intended them to be effective. *See, e.g., Tiffany Fine Arts*, 469 U.S. at 318; *American Stores*, 495 U.S. at 295. The two-part national consensus described in this Brief, as well as this Court's habeas jurisprudence, establishes that the only way to give these statutes effect is to grant the relief Petitioner requests. Congress recognized that there was a capital representation problem when it enacted § 848(q)(4)-(10) (the right to counsel provisions). In offering amendments that now are codified in these subsections, Representative Conyers said "that it is becoming *increasingly difficult to identify counsel throughout the country willing and able to accept the appointment* in a growing number of capital cases for which representation is required." He added that, because "[c]apital cases involve a complex and highly specialized body of law and procedures, . . . this amendment is essential to reduc[e] the amount of litigation associated with capital cases while providing *maximum protection of the defendants' constitutional rights.*" 134 Cong. Rec. 22,996 (1988) (emphasis added).

In enacting § 848(q)(4)-(10), Congress intended to *effectively* resolve the federal habeas counsel problem and protect constitutional rights by providing for early appointment of counsel. To hold otherwise would assume that the same Congress that decided to provide at least one attorney, and sometimes two, § 848(q)(4)(B)-(7), to every petitioner in a capital habeas "proceeding,"

§ 848(q)(4)(B), and further decided that only specially qualified "attorneys" could effectively represent capital habeas petitioners, § 848(q)(6), also decided (in the same act) that death-sentenced prisoners, themselves, would have to investigate, prepare and file habeas petitions to obtain court appointed lawyers, even if the accelerated pace of capital postconviction litigation resulted in their executions before they could obtain lawyers. Such an assumption of Congressional irrationality plainly is unwarranted.

The Court's judgment in *Murray v. Giarratano,* 492 U.S. 1 (1989), is not inconsistent with Petitioner's position in this case. The Constitutional question in *Giarratano* is not now before the Court, but the Court may be called upon to resolve that issue if this Court affirms in this case. Although in *Giarratano,* a plurality held that there is no constitutional right to counsel in capital postconviction cases, Justice Kennedy, joined by Justice O'Connor, concurred in the judgment of the Court only "[o]n the facts and record of this case." *Id.* at 15. An important, perhaps critical, fact in *Giarratano* was that in Virginia there were adequate numbers of volunteer lawyers to represent death row prisoners in postconviction proceedings. *Id.* at 14-15.

In Texas that simply is not true. Texas has run out of volunteer attorneys in many cases, at least when, as a condition of taking a capital case, they must first seek to stay imminent executions.

CONCLUSION

The ABA requests this Court to reverse the Fifth Circuit's decision and order that the district court appoint McFarland counsel and stay his execution for the reasonable period of time necessary to investigate and present his first-time postconviction claims.

Respectfully submitted,

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